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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. ------

THE HARTFORD ACCIDENT AND INDEMNITY COMPANY, a Corporation, *Petitioner,*

vs.

CITY OF SULPHUR, OKLAHOMA, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, Hartford Accident and Indemnity Company, a corporation, prays that a writ of certiorari issue herein to review the judgment of the United States Circuit Court of Appeals for the Tenth Circuit (R. 239, 250) entered on November 10, 1941, reversing the judgment of the United States District Court for the Eastern District of Oklahoma. A petition for rehearing, duly filed by petitioner in the Circuit Court of Appeals (R. 255) was considered and denied on December 15, 1941. (R. 264) Order was made on December 20 staying the mandate for thirty days pending the filing in this court of petition for writ of certiorari (R. 267).

STATEMENT OF THE MATTER INVOLVED

This case originated in the District Court for the Eastern District of Oklahoma and was filed October 4, 1939, by the City of Sulphur, Oklahoma, a municipal corporation, against the Hartford Accident and Indemnity Company, a corporation, organized under the laws of the State of Connecticut, and licensed to do business in the State of Oklahoma. The City of Sulphur alleged in part in its petition (R. 6)

> That the Hartford Accident and Indemnity Company was the surety on the bonds of certain city officials, viz., G. Leslie Horsman, City Clerk, filed May 2, 1936; Newton Rice, City Clerk, filed June 6, 1937; Charles F. Smith, City Clerk, filed August 1, 1937; R. E. Mudd, City Commissioner, filed May 7, 1935; John M. Townsley, City Commissioner, filed May 3, 1935; Glen Ray, Mayor and City Manager, filed April 14, 1936; that such bonds were conditioned that the officials named therein would well and faithfully discharge the duties and trusts imposed upon them by reason of their offices, and honestly account for all moneys coming into their hands by virtue of their offices.
>
> The City for its first, second and third causes of action (R. 6-12), the same being based on the official bonds of the three City Clerks herein named, alleged that said City Clerks during their respective terms of office breached and violated their bonds and duties as officers in that they failed to charge against the appropriations made by the County Excise Board certain itemized claims for labor and materials contracted by the City. That claims therefor were allowed by the Board of City Commissioners but no warrants were issued therefor, but said claims were offset against certain indebtedness due the City by each of the claimants for water sold such claimants and charged that the terms of the bonds sued on

were violated in that the clerks failed to charge the amount of such claims against the annual appropriations. That the clerks issued and signed warrants against the general funds of the City for the amount of the claims so failed by them to be charged against the appropriations for the respective fiscal years, and further alleged under its third cause of action involving the bond of Charles F. Smith, City Clerk, that he failed to account to the City for certain funds collected by him as City Clerk. Judgment was prayed against the defendant as surety on the bonds of the City Clerks in the aggregate sum of $10,486.65.

Prior to trial, the City dismissed its second cause of action based on the bond of Newton Rice, City Clerk. (R. 45).

The City of Sulphur, for its fourth and fifth causes of action (R. 12-14), based on the official bonds of R. E. Mudd and John M. Townsley, City Commissioners, alleged that such Commissioners breached the terms of their bonds in that they voted to allow and pay claims against the City in excess of the approved estimates and appropriations, and offset such claims so allowed against the water bills due the City, and prayed judgment against the defendant as surety on their bond in the aggregate sum of $2,000.00 on each bond;

And for the sixth cause of action based on the official bond of Glen Ray, Mayor-Manager, the City alleged (R. 14-17) that said Glen Ray as Mayor approved and voted for each of the claims mentioned and described in the first, second and third causes of action, and signed warrants in excess of the appropriations, and that in conjunction with the City Clerk, Smith failed to account for the certain funds mentioned and described in the cause of action based on the bond of said City Clerk, Smith.

It is further alleged that said Ray as Manager violated his duties and breached his official bond in that he purchased certain concrete pipe for the City and voted to allow the claim therefor at a higher price than submitted by lower bidders, and voted to allow a claim for pipe in excess of the amount received. That he appointed one Hugh Cushenberry, former member of the Board, as Water Commissioner in violation of the City Charter, and voted to allow the salary claim. The City alleged loss and damage to the City by reason of such acts of the City officials, and prayed judgment against the defendant as surety on the official bonds in the aggregate and total sum of $22,433.45.

The defendant, Hartford Accident and Indemnity Company, for answer to the complaint (R. 20-34), admitted

That it was surety on the official bonds of each of the named City officials, but denied that the terms of the bonds had been breached and alleged that if any liability arose against said officials or their official bonds by reason of the acts charged against them, such liability was created by statute and constituted a penalty, and that the same was barred by the statute of limitation in such cases made and provided, and for its third party complaint, the defendant alleged that it was only secondarily liable on the official bonds sued on, and prayed that in the event it should be adjudged liable and should pay any amount in satisfaction of judgment, that it have judgment therefor over and against the principals of the bonds for such sum paid.

The City filed an amendment to its complaint (R. 35), in which it alleged

That since the institution of the action, it had collected certain listed sums and amounts from other

sureties on the bonds of such officials, and stated that its prayer should therefore be reduced in the sum of $1,687.50.

After trial of the cause to the court, memorandum opinion was filed on November 7, 1940 (R. 36-38). On November 26, 1940, findings of fact and conclusions of law were filed (R. 38-43), and on January 23, 1941, amended findings of fact and conclusions of law were filed (R. 44-50).

The District Court found with reference to the first and third causes of action which were based on the official bonds of the City Clerks, that the liability, if any, accrued more than one year prior to the bringing of the action and concluded as a matter of law (R. 49):

> "1. The court concludes, insofar as the City Clerks are concerned in the various causes of action, that plaintiff's cause of action, if any, is barred, that the applicable statute of limitations is one year. Battles v. Conner, 182 Okla. 613, 79 Pac. (2d) 232."

The District Court found with reference to that part of plaintiff's alleged cause of action based on the official bonds of R. E. Mudd and John M. Townsley as City Commissioners and against Glen Ray as Mayor-Manager in part as follows (R. 45-47):

> "With regard to this, the Court finds that during the times named in the plaintiff's complaint, the Board of Commissioners of the City of Sulphur, instead of collecting some of its water bills in cash, would permit the same to be offset with the labor claims. For example, an individual owing the City a water bill would be employed by the City to work upon its streets for a given length of time, and after performing this work, the individual would file a claim for labor in the amount of his water bill, and

the Commissioners would thereupon allow the claim and cancel the water bill. No cash was collected for the water and no warrant was written to pay the labor claim. * * *The whole scheme of the City Commissioners was an effort to provide labor for some of its citizens during the period designated in plaintiff's complaint. The City officials, in obtaining their appropriations during this period, did not obtain any appropriation of funds for the payment of labor bills in question. After obtaining an appropriation itemized as required by law, the specific items and amounts thereof not being material herein, the said City officials would proceed to spend during the fiscal year all of the funds appropriated and would write warrants for the full amount, or substantially so, for each item of the appropriation. According to the methods by which the books of the City were kept, no warrants were written in excess of the appropriation during any fiscal year involved in this suit. * * * The Court finds that the practical result of this method of handling the finances of the City was to expend more money than was lawfully appropriated by the City, and that the amount of the excess spending resulting from this plan was in each fiscal year the amount of the water bill so offset against labor bills."

The District Court in its conclusions of law, Section 2 (R. 50), said:

"The Court concludes that, as to the liability of the City Managers and City Commissioners by reason of the labor claims offset against the water bills, the applicable statute of limitation is three years; that the Board of Commissioners of the City of Sulphur composed of Glen Ray, John M. Townsley, R. E. Mudd, and others not parties to this action, illegally expended during the fiscal year 1936-1937 the sum of $2,235.10, for which the City has not been reimbursed; * * * for the fiscal year 1937-1938, the sum of $4,260.67, for all

of which sums they, and each of them, are liable and for which the defendant, the Hartford Accident and Indemnity Company, is liable as surety to the extent of the bonds executed by it on behalf of said third party defendants."

The District Court further concluded that the plaintiff was not entitled to recover on any of the various other causes of action set forth in its complaint (R. 50).

Judgment was entered for the City against the Hartford Accident and Indemnity Company for the sum of $6,495.77 (R. 51).

An appeal was duly perfected to the Circuit Court of Appeals by the Hartford Accident and Indemnity Company from the judgment against it, and supersedeas bond was filed and approved (R. 54). Among the several points relied upon by appellant were the following (R. 1-2):

"2. That the Court's findings of fact are in part erroneous and inconsistent with the weight of the evidence, and that the conclusions of law thereon based are inconsistent with the weight of authority.

"3. * * * * * That said claim against said R. E. Mudd was based upon a liability created by statute for voting for the allowance of claims and constituted a penalty, and said cause of action, if any, was barred by the one year statute of limitation.

"4. * * * * * That said claim against said John M. Townsley was based upon a liability created by statute for voting for the allowance of claims and constituted a penalty, and said cause of action, if any, was barred by the one year statute of limitation.

"5. * * * * * That said claim against said Glen Ray was based upon a liability created by statute for voting for the allowance of claims and constituted a

penalty, and said cause of action, if any, was barred by the one year statute of limitation.

"6. That the action of the District Court of the United States for the Eastern District of Oklahoma in rendering judgment in favor of the City of Sulphur and against the appellant was erroneous for the reason that no cause of action was stated or existed against the appellant by reason of the allowance of labor claims to offset against water bills."

A cross appeal was filed by the City of Sulphur. Among the points relied upon by it were (R. 4):

"4. The trial court erred in applying moneys collected by the plaintiff from the American Surety Company and the National Surety Corporation, in the sum of $1125.00.

"5. An action upon the bond of a city official in the State of Oklahoma for misappropriation of funds is not barred by the statute of limitations until five years after the cause of action accrued.

"7. The court erred in holding that plaintiff's cause of action was barred on all water claims allowed and offset more than three years before the filing of this action."

The appeal was heard before the Circuit Court of Appeals, Tenth Circuit, and that Court in its judgment and opinion (R. 239, 250) entered November 10, 1941, reversed the judgment of the District Court, and in concluding its opinion, said:

"For error in allowing credit for the full amount paid by the sureties on the bonds of other Commissioners, the judgment is reversed and the cause remanded." (R. 250).

It will be noted from the decision that the Circuit Court of Appeals reversed the judgment of the District

Court solely for error in allowing credit for amounts paid by sureties on other bonds of the Commissioners, which was the fourth point relied on by the City in its cross appeal, but the Circuit Court in its decision discussed the several other points relied on and in issue before it, and approved and sustained the conclusions of law and judgment of the District Court on all other points except the Circuit Court held that the five-year statute of limitation was applicable and controlled the liability which was found to arise against your petitioner as surety on the official bonds of the City Commissioners and Mayor-Manager of the City of Sulphur (R. 245-246), while the District Court held that the three-year statute of limitation applied to such liability (R. 50).

Your petitioner as appellant in the Circuit Court contended and here asserts that the acts of the City officers in the matter of allowing labor claims to offset water bills did not create a liability under Section 5955, *O. S.* 1931, in favor of the City; that the liability, if any, was penal in nature, and therefore the one year period or statute of limitation applied and barred any recovery on such liability (R. 2).

The error assigned by the Circuit Court in its decision as ground for reversing the judgment of the District Court is only incidental here and is not directly involved in the questions presented by this petition or relied on for the allowance of the writ.

The question here presented as ground for the writ is:

> Whether the Circuit Court of Appeals in its decision and judgment of November 10, 1941, decided important questions of local law in conflict with applicable State decisions, and failed to follow applicable decisions of the Supreme Court of the State of

Oklahoma in the construction and application of Section 5955, O. S. 1931, which relates to the approval and allowance of City claims in excess of approved current estimates, and also failed to follow applicable decisions of the Oklahoma Supreme Court in the construction and application of the Oklahoma statute of limitations, Section 101, O. S. 1931, as applied to the liability which is held to arise on the official bonds of the City Commissioners and Mayor-Manager, and their surety, under said Section 5955, O. S. 1931, and erred in holding (R. 244):

"(a) Each instance of offsetting was tantamount to the water bill being paid in money, the money being covered into the city treasury, and the claim for labor being allowed and paid out of city funds. But other claims for all or substantially all of the appropriations made by the excise board for the current fiscal year were allowed and paid by warrant in the manner authorized by law. It therefore is readily apparent that the essense and effect of the action of the mayor and manager and the commissioners in offsetting claims against claims in the manner and under the circumstances outlined was to incur, acknowledge, approve, allow and authorize an indebtedness against the city in excess of the estimate made and approved by the excise board for such purpose, in contravention of laws of the state, particularly Sec. 5955, supra, for which such section expressly makes the surety on their official bonds liable. It amounted to the unauthorized expenditure of city funds in excess of the appropriation made for that purpose. Regardless of the actuating motive, it constituted a wrongful misapplication of funds for which the company is liable. * * * *

"(b) The City sought in these causes of action to recover for funds wrongfully expended. No additional recovery was sought. No double recovery was involved. The liability was therefore not penal in nature. The fifth subdivision of section 101, supra, provides that an action upon the official bonds or under-

taking of an executor, administrator, guardian, sheriff, or any other officer can be brought only within five years after the cause of action shall have accrued, and not afterwards. In respect to limitation, that provision has application to a suit upon the official bond of a mayor and manager and city commissioners, except where a penalty is sought." (R. 245).

The statutes here involved are Sections 5955, *O. S.* 1931 (formerly Sec. 8638, *C. O. S.* 1921, Chap. 80, *Session Laws* 1910-11), which reads:

"It shall be unlawful for the board of county commissioners, the city council or the commissioners of any city, the trustees of any town, board of education, township board, school district board or any member or members of the aforesaid commissioners, or of any of the above named boards, to make any contract for, incur, acknowledge, approve, allow or authorize any indebtedness against their respective municipality or authorize it to be done by others, in excess of the estimate made and approved by the excise board for such purpose for such current fiscal year, or in excess of the specific amount authorized for such purpose by a bond issue. Any such indebtedness, contracts incurred, acknowledged, approved, allowed or authorized in excess of the estimate made and approved for such purposes for such current fiscal year or in excess of the specific amount authorized for such purpose by a bond issue, shall not be a charge against the municipality whose officer or officers contracted, incurred, acknowledged, approved, allowed or authorized or attested the evidence of said indebtedness, but may be collected by civil action from any official contracting, incurring, acknowledging, approving or authorizing or attesting such indebtedness, or from his bondsmen."

The relevant and involved parts of the statute of limitation, Section 101, *O. S.* 1931, read:

> "Civil actions, other than for the recovery of real property, can only be brought within the following periods, after the cause of action shall have accrued, and not afterwards: * * * * *
>
> "Second: Within three years: * * * * an action upon a liability created by statute, other than a forfeiture or penalty.
>
> "Fourth. Within one year: * * * * an action upon a statute for penalty or forfeiture, except where the statute imposing it prescribes a different limitation.
>
> "Fifth. An action upon the official bond or undertaking of an executor, administrator, guardian, sheriff, or any other officer, or upon the bond or undertaking given in attachment, injunction, arrest, or in any case whatever required by the statute, can only be brought within five years after the cause of action shall have accrued."

The Circuit Court erred in its judgment and holding (R. 244):

> (a) "Each instance of offsetting of city water bills against labor claims was tantamount to the water bill being paid in money, the money being covered into the city treasury, and the claim for labor being allowed and paid out of City funds. * * * * * In contravention of the laws of the State, particularly Section 5955, O. S. 1931 for which such section expressly makes the surety on their official bonds liable. It amounted to the unauthorized expenditure of City funds in excess of the appropriation made for that purpose. * * * It constituted a wrongful misappropriation of funds for which the company is liable."

because such conclusion and holding is a strained con-

struction of the facts and an unwarranted construction and application of the statute (Sec. 5955) thereto.

It is in conflict with the reasoning and decision of the Supreme Court of Oklahoma in the case of *State ex rel. Sweeney* v. *Oklahoma Natural Gas Corp., et al.*, 177 Okla. 62, 57 P.2d 626. In that case, the plaintiff sought to recover a sum alleged to be due the City of Tulsa as a franchise tax for the use of the City streets and was based upon Section 5964, *O. S.* 1931, which makes City officials liable for unlawful expenditure of City funds and property, and was predicated upon the theory that failure of the City officials to enforce or collect the franchise tax was tantamount to the unlawful expenditure of city funds, but the Oklahoma Supreme Court held to the contrary, and in its opinion said:

> "It may be conceded that the failure to collect that which is collectible may have the same effect as the paying out of that which should not be paid out. The effect may be just as vicious in the one case as the other. The truth of that fact, however, does not authorize us to read into the penal statute that which is not there."

Paragraphs 1 and 3 of the syllabus read:

> "1. Statutes authorizing recovery of penalties based on unlawful or fraudulent contracts or transactions by officers of governmental subdivisions are penal, and must be strictly construed from the viewpoint of the taxpayer.
>
> "3. A penal statute may not be extended by construction to cover acts or omissions which are not by the express will of the Legislature made offenses, though such acts or omissions may be as vicious as those within the terms of the statute."

The statute, Section 5955, *O. S.* 1931, here involved and quoted herein, does not make the City officers liable to the City for failure to collect bills or claims due the City, nor does it include within its terms any liability to the City for voting to offset water bills with claims against the City. It was beyond the power of the City Commissioners and Mayor-Manager to discharge, offset or cancel the City water bills, and they remained valid, outstanding claims. The mere voting to allow the labor claims without actual payment by the expenditure of City funds did not create a liability against the officials and their surety in favor of the City. The statute makes the City Commissioners and Mayor-Manager liable to the claimant on the labor claims, but expressly exempts the City. *Board of County Commissioners* v. *Western Bank & Office Supply Co.*, 122 Okla. 245, 254 Pac. 741. There was in fact and in law no expenditure of City funds and no liability in favor of the City arose under Section 5955.

The Circuit Court further erred in its judgment and holding (R. 245):

> (b) The City sought in these causes of action to recover for funds wrongfully expended. No double recovery was involved. The liability was therefore not penal in nature. The fifth subdivision of Section 101, supra, that an action upon the official bond or undertaking of an executor, administrator, guardian, sheriff, or other officer, or upon the bond or undertaking given in attachment, injunction, arrest, or in any case whatever required by the statute, can only be brought within five years after the cause of action shall have accrued, and not afterwards. In respect to limitation, that provision has application to a suit upon

the official bond of a Mayor and Manager and City Commissioners, except where a penalty is sought.

It is erroneous.

First, because it holds the liability in favor of the City was not penal in nature, which holding is in conflict with applicable decisions of the Supreme Court of Oklahoma which hold such liability to be penal in its nature.

Second, because it holds that the five-year statute of limitation is controlling and applicable to the liability, which holding is in conflict with applicable decisions of the Supreme Court of Oklahoma which hold the one year statute of limitation applies to actions upon a statute penal in nature.

The Circuit Court holds (R. 245) that the liability in favor of the City and against the City Commissioners and Mayor-Manager and their surety on their official bonds arose under Section 5955, *O. S.* 1931, which statute, in several decisions by the Supreme Court of Oklahoma, has been held to be penal:

Carey, Lombard, Young & Co. v. *Hamm*, 61 Okla. 174, 160 Pac. 878;

Battles v. *Conner, County Treasurer*, 182 Okla. 613, 79 P.2d 232;

Board of County Commissioners v. *Western Bank & Office Supply Co.*, 122 Okla. 245, 254 Pac. 741;

Klein Iron & Foundry Co. v. *Board of County Commissioners*, 178 Okla. 72, 61 P.2d 1055.

The Oklahoma Supreme Court holds that the statute is penal in nature and fixes a liability not imposed by the general law.

In *Battles* v. *Conner,* supra, the court cites with approval the prior decision of the Court holding the statute (Sec. 5955, supra, also Sec. 5953) to be penal in nature and followed such rule in the application of Section 5953, *O. S.* 1931, which section is in the nature of a companion to Section 5955, supra, except it applies to City Clerks, both being enacted at the same time as part of Chapter 80, Session Laws 1910-11.

In *Board of County Commissioners* v. *Western Bank & Office Supply Co.,* supra, the Court, in its opinion on rehearing (p. 249, State Reports), said:

> "The purpose of this provision of the statute is both penal and remedial. It is in the nature of a penalty against the officers for the purpose of deterring them from entering into such pretended agreements. It is in the nature of a remedy in that it permits the person furnishing such goods, wares, merchandise or labor, to recover through the courts solely against the officers so prostituting their official authority."

Any recovery under the statute is penal because, as construed by the Oklahoma decisions, it fixes a liability not imposed by the general law. No double liability or recovery is provided for in the statute, and the liability, if any, arising in favor of the City under the statute is no less penal because the City did not seek a double recovery.

The Circuit Court erred in its judgment and decision with respect to the statute of limitation in applying the five-year statute, sub-section five, Section 101, supra, to the liability arising under Section 5955, upon the official bonds of the Commissioners and Mayor-Manager, because Section 5955, supra, is penal in nature, as held and construed by the Oklahoma Supreme Court, and any

liability arising under the statute is controlled by the one-year statute of limitation, sub-section 4, Sec. 101, supra, which requires an action upon a statute for a penalty or forfeiture, except where the statute imposing it prescribes a different limitation, to be brought within one year. The application of the five-year statute of limitation to the liability found in favor of the City is in conflict with the decision of the Supreme Court of Oklahoma in the case of *Battles* v. *Conner, County Treasurer,* 182 Okla. 613, 79 P.2d 232. In the opinion in that case, page 615, it is said:

> "An action to recover a penalty is governed by paragraph 4, section 101, supra, limiting the period to one year. It reads in part as follows: 'Fourth. Within one year: * * * an action upon a statute for penalty or forfeiture, except where the statute imposing it prescribes a different limitation.' * * * We see no reason why the statute of limitations referred to should not apply to a statute both penal and remedial in its operation when it authorizes an action for what is in fact a penalty."

The Circuit Court of Appeals in its decision followed the decision of the Supreme Court in *Battles* v. *Conner,* supra, and applied the one year statute of limitation to the liability which the City of Sulphur sought to enforce under its first and third causes of action against the City Clerks and their surety, and denied any recovery because the liability, if any, was barred by limitation, but failed to follow or apply the same rule and period of limitations to the liability as against the City Commissioners and Mayor-Manager. There appears no logical reason for making a distinction between the liability and limitation statute as against the City Clerks and that against the City Commissioners. The liability as to each was penal in its nature.

The application of the five-year statute of limitation by the Circuit Court of Appeals to the liability found to arise under Section 5955 is also in conflict with the decisions of the Supreme Court of Oklahoma in the cases of

State ex rel Shillings v. *Oklahoma City*, 67 Okla. 18, 168 Pac. 227;

State ex rel Gooch v. *City of Drumright*, 88 Okla. 244, 212 Pac. 991.

which hold that a suit to recover a penalty against an officer is barred by the one-year statute of limitation.

Likewise, the Circuit Court of Appeals in its decision and judgment of November 10, 1941, failed to consider or follow the Oklahoma Supreme Court decisions in

Morrissey v. *Carter*, 103 Okla. 36, 229 Pac. 150;

Shutt v. *Farmers Gin & Supply Co.*, 172 Okla. 578, 46 P.2d 348;

Harris v. *Roberts*, 179 Okla. 569, 66 P.2d 931.

In the latter case, it is held:

> "In the consideration of the question of the application of the statute of limitation on official bonds, it has been held that whenever a cause of action against an official is barred by any statute of limitations, the right to maintain an action therefor upon his official bond, which simply operates as security for the same thing, must necessarily cease to exist."

The Oklahoma decisions cited and apparently relied on by the Circuit Court of Appeals in its opinion are inapplicable to the facts and statutes here involved because they involved cases where the officers unlawfully paid and disbursed funds on hand and in the treasury of the

County and the liability there involved arose under a different statute from Section 5955, supra.

The United States Circuit Court of Appeals should have followed the applicable decisions of the Supreme Court of Oklahoma in the construction and application of the Oklahoma statutes involved.

> *Federal Judiciary Act* 1789, Chap. 20, 28 USC 725;
>
> *Erie Railroad Co.* v. *Thompkins,* 304 U. S. 64, 82 L. Ed. 1188;
>
> *Hartford Accident & Indemnity Co.* v. *Nelson Mfg. Co.,* 291 U. S. 352, 78 L. Ed. 840;
>
> *Klaxon* v. *Stentor Electric Mfg. Co.,* 85 L. Ed. 969 (advance opinions).

In *Bassinger* v. *U. S. Fidelity & Guaranty Co.* (8th Cir.), 58 F.2d 573 (certiorari denied 287 U. S. 622), it is said:

> "It would be very unfortunate if the liability upon bonds required by the statutes should be subject to the rule in the courts of that state and to another in the Federal Courts."

The question here presented and the reasons relied upon for the allowance of the writ are of much public importance because of the conflict between the decision and judgment of the United States Circuit Court and the decisions of the Supreme Court of the State of Oklahoma in the matter of the construction and application of the Oklahoma statute, Sec. 5955, supra, with respect to the controlling statute of limitation applied to the liability arising against municipal officers and their surety under said statute. It is of vital interest and importance to the numerous city, town, county, township and school district officials

and their sureties in Oklahoma, who are charged with the duty of passing upon and allowing claims against their respective municipalities. The question presented is of much importance to your petitioner because the action involves a considerable sum, and your petitioner, and other surety companies similarly situated, are surety on numerous other bonds in Oklahoma on which the liability and limitation will be affected by the holding in this case. It is important that the apparent conflict between the decision in the United States Circuit Court and the decisions of the State Court be removed, and a correct and uniform construction and application of the statutes involved be established.

A certified transcript of the record is submitted herewith.

WHEREFORE, it is respectfully submitted that this petition for certiorari should be granted and the writ issue, and petitioner prays that the decision and judgment of the Circuit Court of Appeals for the Tenth Circuit be reversed.

THE HARTFORD ACCIDENT AND INDEMNITY COMPANY,
Petitioner,

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Oklahoma, City, Oklahoma,
Counsel.

ARTHUR LEACH,
JOHN F. WEBSTER,
WALTER D. HANSON,
A. J. RITTENHOUSE,
Associate Counsel.

CERTIFICATE OF COUNSEL

State of Oklahoma }
County of Oklahoma } ss

F. A. Rittenhouse, upon oath, states: That he is one of the attorneys for petitioner in the above and foregoing petition; that he has read the same and has personal knowledge of the matters and things therein set forth, and believes the same to be true.

Affiant further states that the petition is prepared and filed in good faith, and that the same is meritorious and is not prepared and presented to be vexatious or to delay the final opinion and judgment in the case.

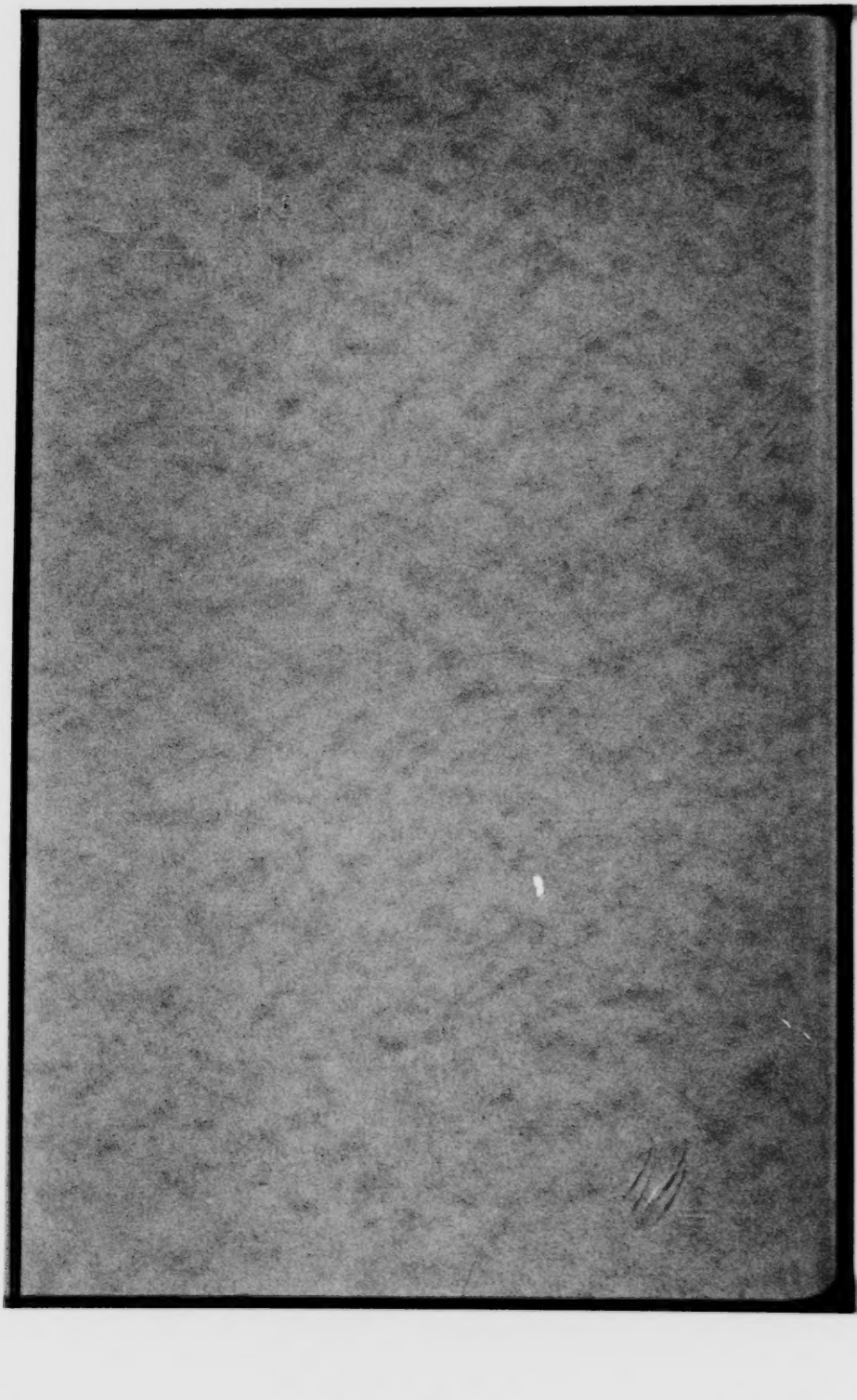
F. A. Rittenhouse.

Subscribed and sworn to before me this 7th day of January, 1942.

Cecil Bundy, *Notary Public.*

(Seal)

My commission expires March 17, 1944.



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Under the Law of the State of Oklahoma and the Decisions of the Supreme Court of that State, the Facts, as Found in this Case Show a Wrongful Misapplication of Funds by Officers of the City of Sulphur Which May Be Recovered from the Sureties of the Officers of the City.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. **864**

THE HARTFORD ACCIDENT AND INDEMNITY COMPANY, a Corporation, *Petitioner,*

vs.

CITY OF SULPHUR, OKLAHOMA, *Respondent.*

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The opinion of the Circuit Court of Appeals is reported in 123 Fed. (2d) 566.

We believe the opinion of the Circuit Court of Appeals presents a complete answer to the petition in this case, but we may be able to aid the Court by filing a brief response.

SUPPLEMENTAL STATEMENT OF CASE

Petitioner quotes a portion of the 10th finding of fact by the trial court but has omitted portions thereof. This finding reads as follows:

> "* * * With regard to this the court finds that during the times named in the plaintiff's complaint the Board of Commissioners of the City of Sulphur, instead of collecting some of its water bills in cash, would permit the same to be offset with the labor claims. For example an individual owing the city a water bill would be employed by the city to work upon its streets for a given length of time, and, after performing this work, the individual would file a claim for labor in the amount of his water bill and the City Commissioners would thereupon allow the claim and cancel the water bill. No cash was collected for the water and no warrant was written to pay the labor claim. *Frequently in instances where the water bill amounted to a substantial sum the person owing the water bill would employ individuals to work upon the streets and pay them for their work. Thereupon the individuals performing the work would file a claim with the city for work. The claims would be allowed and the water bill of the individual hiring the labor would be canceled. In several instances business firms selling supplies to the City of Sulphur, instead of filing a claim for the payment of said supplies, would file a claim designated as a labor claim, the same would be allowed, no warrant would be written to pay the same, but the water bill of the individual or firm would be canceled.* The whole scheme of the City Commissioners was an effort to provide labor for some of its citizens during the period designated in plaintiff's complaint. The city officials, in obtaining their appropriations during this period did not obtain any appropriation of funds for the payment of the labor bills in question. After obtaining an appropriation itemized as required by law, the spe-

cific items and the amounts thereof not being material herein, the said city officials would proceed to spend during the fiscal year all of the funds appropriated, and would write warrants for the full amount, or substantially so, for each item of the appropriation. According to the method by which the books of the city were kept, no warrants were written in excess of the appropriation during any fiscal year involved in this suit. *With regard to these water transactions the records of the city disclose that the labor claims which offset he water bills were allowed by the City Commissioners.* * * *"

That part omitted by petitioner is in italics.

PROPOSITION I

Under the Law of the State of Oklahoma and the Decisions of the Supreme Court of That State, the Facts, as Found in This Case, Show a Wrongful Misapplication of Funds by Officers of the City of Sulphur Which May Be Recovered from the Sureties of the Officers of the City.

The Circuit Court in holding that the facts found by the trial court show a misappropriation of funds relies on:

Dowler vs. *State,* 179 Okla. 532, 66 Pac. (2d) 1081, and Secs. 5955, 12674, 12677, 12678, 12681, 12682 and 5948 O. S. 1931.

PROPOSITION II

Under the Laws of the State of Oklahoma and the Decisions of the Supreme Court of That State, an Action by a City in Oklahoma Against the Surety on Bonds of Its Officers for Recovery of Funds Misappropriated by Them, Is Not Penal in Nature.

In holding that plaintiffs' action is not for a penalty, the Circuit Court cited and relied on *State* vs. *Ingram,* 164 Okla. 244, 23 Pac. (2d) 648.

Neither of these cases is mentioned or referred to, explained or distinguished, by petitioner.

None of these statutes cited, except Sec. 5955, are mentioned or referred to in the petition.

The Court could also very well have cited Section 5968 O. S. 1931, which reads as follows:

> "Any member of the board of county commissioners, township board, city council, board of trustees of incorporated town, knowingly, wilfully and intentionally allowing any claims or entering into any contract on the part of such county, township, city or incorporated town, not specifically authorized by law, shall be deemed guilty of a felony and upon conviction shall be punished by imprisonment in the penitentiary for a term not to exceed five years, and *the official bond of said officer shall in any event be liable for the amount or amounts of money so unlawfully expended or misappropriated.*" (62 Okla. St. Ann. 303.) (Emphasis ours.)

And 6414 O. S. 1931 (11 Okla. St. Ann. 676), as follows:

> "The members of any city council, who shall intentionally vote to appropriate money or to allow any bill or claims, not authorized by law, shall be personally liable to said city for the amount of such money appropriated, or bills or claims allowed, with costs of suit, in an action before any court, having competent jurisdiction."

The cases cited by petitioner are not in point. In the case at bar, the City Commissioners and Mayor-Manager wrongfully expended money belonging to the City. They allowed and approved claims against the City for which no appropriation had been made. They misappropriated the

funds of the City. This was the case in *Dowler* vs. *State, supra,* and in *State* vs. *Ingram, supra.*

Not so in the cases cited by petitioner. In *State* vs. *Oklahoma Natural Gas Company,* 177 Okla. 62, 57 Pac. (2d) 626, a taxpayers suit, it was alleged the City failed to collect taxes due the City. The court distinguishes this case from *State* vs. *Ingram* in the body of the opinion (loc. cit. 57 Pac. (2d) 628).

Board of County Commissioners vs. *Western Bank & Office Supply Company,* 122 Okla. 245, 254 Pac. 741, was an action by the supply company against the County to recover the purchase price of goods sold to the County for which no appropriation had been made, or for the return of the goods.

In *Carey, Lombard, Young & Company* vs. *Hamm,* 61 Okla. 174, 160 Pac. 878, suit was against the officers for purchasing material within an estimate made, and approved by the excise board, but later held to be invalid. The Court held the officers were not liable.

In *Battles* vs. *Conner,* 182 Okla. 613, 79 Pac. (2d) 232, a County Treasurer registered a warrant in excess of the estimate made and approved by the excise board, and which was not paid by the County. (The Court will note this case was cited and distinguished by the Court in the case at bar.)

Klein Iron & Foundry Company vs. *Board of County Commissioners,* 178 Okla. 72, 61 Pac. (2d) 1055, was a suit

by the Foundry Company to recover goods sold to the County for which no appropriation had been made.

The cases cited by petitioner are not in point. They refer to an entirely different state of facts and throw no light whatever upon the question presented in the case at bar. In none of these cases had the municipality sustained a loss.

PROPOSITION III

Under the Laws of the State of Oklahoma and the Decisions of the Supreme Court of That State, the Five Year Statute of Limitations Is Applicable to the Case at Bar.

Now as to the proper application of the statute of limitations:

The Circuit Court of Appeals cited and relied on the following cases:

National Surety Co. vs. *State,* 111 Okla. 185, 239 Pac. 262;

Arnold vs. *Board of Commissioners,* 124 Okla. 42, 254 Pac. 31; and

James vs. *State,* 160 Okla. 99, 15 Pac. (2d) 591.

In *National Surety Company* vs. *State, supra,* the 7th paragraph of the syllabus reads as follows:

> "Where suit is brought against a county treasurer and the surety on his official bond for the value of securities unaccounted for by the county treasurer, the one-year statute of limitations does not apply, but the action is upon a written contract—the surety bond—and the five-year statute of limitations applies."

In *Arnold* vs. *Board of County Commissioners, supra,* the 3rd paragraph of the syllabus reads in part, as follows:

> "Section 185, C. O. S. 1921, providing that an action upon an official bond can only be brought within five years after the cause of action shall have accrued, is the applicable statute of limitations, in an action by a county on the official bond of the court clerk required and given pursuant to section 864, Id., before entering upon the duties of his office."

In *James* vs. *State, supra,* the 5th paragraph of the syllabus reads as follows:

> "Subdivision 5, of Section 185, C. O. S. 1921, provides the limitation of time within which an action may be commenced against a county treasurer and the surety on his official bond to recover for loss to the county on the liability created by section 4270 C. O. S. 1921, making the county treasurer custodian of funding bonds issued by the county after such bonds have been signed by the judge of the district court."

Petitioner cites *State ex rel Shillings* vs. *Oklahoma City,* 67 Okla. 18, 168 Pac. 227, which needs especial mention. This case would appear to be exactly in point in the case at bar, but we call the attention of the Court to the fact that the part of the opinion in that case which is in conflict with the opinion of the court in this case, was expressly overruled in *State* vs. *Ingram,* 164 Okla. 244, 23 Pac. (2d) 648. (See body of the opinion, loc. cit. 23 Pac. (2d) 654.)

In view of the finding of the trial court and the Circuit Court of Appeals that the case at bar is an action for misappropriation of funds, and not an action for a penalty, the other cases cited by petitioner shed no light upon the question involved in this case.

CONCLUSION

The judgment of the trial court having been superseded (Tr. 54), and the Mandate having been stayed in this case (Tr. 267), and it being so clearly shown by the record that the Circuit Court of Appeals has followed the decisions of the Supreme Court and the laws of the State of Oklahoma in its decision, we respectfully suggest that this is a case for the application of Paragraph 2, of Rule 30, of this Court.

Respectfully submitted,

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W. J. WILLIAMS,
J. E. WILLIAMS,
All of Ardmore, Oklahoma,
Counsel for Respondent.